

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

STANLEY DUANE BURKETT,

Defendant-Appellee.

UNPUBLISHED

August 22, 1997

No. 194484

Oakland Circuit Court

LC No. 95-138765-FC

Before: Sawyer, P.J., and Bandstra and E. A. Quinnell*, JJ.

MEMORANDUM.

By delayed leave granted, the prosecutor appeals both the quashing of the assault with intent to commit murder charge and the imposition of a downward departure sentence of five to twenty years' imprisonment as to defendant's plea-based conviction of possession of cocaine over 50 but less than 225 grams, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii). This case is being decided without oral argument pursuant to MCR 7.214(E).

Inasmuch as defendant pled guilty to the remaining charges after quashal of the assault with intent to commit murder charge over prosecution objection, the prosecutor's pursuit of the assault with intent to murder charge does not violate defendant's double jeopardy rights, *People v Goans*, 59 Mich App 294; 229 NW2d 422 (1975), and this Court properly has jurisdiction of the prosecutor's appeal of that issue. *People v Torres*, 452 Mich 43, 55; 549 NW2d 540 (1996); MCL 770.12; MSA 28.1109. The issue thus framed is whether the district court abused its discretion in binding defendant over on that charge. *People v Justice (After Remand)*, 454 Mich 334; 562 NW2d 652 (1997). Assault with intent to murder requires actual intent to kill, but reasonable inferences may be drawn regarding that intent. *People v Guy Taylor*, 422 Mich 554, 567-568; 375 NW2d 1 (1985).

The magistrate, as a person of ordinary prudence and caution, could conscientiously have entertained a reasonable belief of defendant's guilt of the assault charge, *People v Justice, supra*, based on evidence indicating that a shot was fired from defendant's vehicle while Officer Story's vehicle was alongside, that the shot had to be fired at Officer Story because the driver's window was the only open aperture on defendant's vehicle, which suffered no gunshot damage, and that, given the positions

* Circuit judge, sitting on the Court of Appeals by assignment.

of defendant and his passenger, the shot could only have been fired by defendant (or defendant would have had to aid and abet his passenger by positioning himself to offer her a clear field of fire so as to avoid injury to himself). The nature of the weapon, a 9 millimeter handgun with at least 7 rounds of ammunition, the direction of fire and the proximity of Officer Story lead to a reasonable inference of intent to kill, even if such evidence might not satisfy a trier of fact beyond a reasonable doubt of defendant's guilt of the assault charge. *People v Justice, supra*. The district court accordingly did not abuse its discretion and the circuit court erred in quashing the charge.

As to the imposition of a departure sentence, whether a particular factor relevant to a departure sentence exists is a factual question reviewed under the clearly erroneous standard; the determination that a particular factor is objective and verifiable is an issue of law reviewed by this Court de novo, and the trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence are reviewed for abuse of discretion. *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). This Court properly has jurisdiction of the prosecutor's appeal of a sentencing issue. *People v Mitchell*, 454 Mich 145, 172; 560 NW2d 600 (1997).

That the sentence was the consummation of a plea bargain pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), again over prosecutorial objection, does not expand the trial court's authority to impose a departure sentence. The judiciary's sentencing discretion exists only by legislative delegation. *Petition of Callahan*, 348 Mich 77; 81 NW2d 669 (1957); *People v Moore*, 51 Mich App 48; 214 NW2d 548 (1974).

Here, the trial court did not itself articulate the factors it deemed objective and verifiable and otherwise as warranting a downward departure sentence. Assuming arguendo the trial court adopted the reasons advanced by defense counsel, the court relied on defendant's age of twenty-six years, his lack of prior criminal record, his family support, and his role in the criminal offense. Defendant's age and criminal history are objective and verifiable factors, and the trial court's findings in regard thereto are not clearly erroneous. Defendant's family support is a subjective factor and therefore not properly considered. Defendant's role in the transaction, represented at sentencing by defense counsel as that of a mere courier, is contradicted by the presentence report, wherein defendant acknowledged that he possessed the cocaine with intent to deliver, and had regularly been selling cocaine for money. Defendant had no other reason to be involved except for profit, since he denied any personal use of hard drugs. Additionally, in the course of the offense defendant caused a firearm to discharge in an urban area; by defendant's version of the offense, he recklessly threw a loaded pistol out of a speeding motor vehicle in a populated area, causing it to discharge and presenting an obvious danger to any persons in the vicinity. Defendant also led police on a chase through a populated area. His age is neither so young nor so old as to be significant in terms of a departure sentence. *People v Pearson*, 185 Mich App 773; 462 NW2d 839 (1990); cf. *People v Fields, supra*, 448 Mich at 78-79, and cases cited therein. Under the totality of the circumstances, it was an abuse of discretion to impose a departure sentence.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Edward A. Quinnell